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No. 94-1233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BLAZE CONSTRUCTION CO., INC.,
Petitioner,

v.

TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

BRIEF IN OPPOSITION

TOM UDALL
New Mexico Attorney General
FRANK D. KATZ
Counsel of Record
Sp. Asst. Atty. General
Taxation and Revenue Dept.
P.O. Box 630
Santa Fe, New Mexico 87509
(505) 827-0731
Counsel for Respondent

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QUESTIONS PRESENTED

1. Is the authority of a State to impose a non-discriminatory tax on contractors performing work for the federal government on Indian reservations determined under the intergovernmental immunity doctrine as enunciated in *United States v. New Mexico*, 455 U.S. 720 (1982), or under the Indian pre-emption doctrine, previously applied only to taxpayers contracting with tribes, tribal members or tribal entities for work done on tribal reservations.

2. If the Indian pre-emption doctrine were applicable, does the Federal Lands Highway Program evince a congressional intent to pre-empt state tax on the construction of public federal roads built for the Bureau of Indian Affairs (BIA) on tribal reservations, as required by *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

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BRIEF IN OPPOSITION

The Taxation and Revenue Department of the State of New Mexico (Department) respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Blaze Construction Co., Inc. (Blaze).

STATEMENT OF THE CASE

Blaze's Statement of relevant law, the facts and the proceedings below is accurate, but incomplete. Several significant facts have been omitted.

The four roads in question were built under the Federal Lands Highway Program, 23 U.S.C. § 204, as part of a

coordinated program for highway construction on a variety of federal lands. These federal roads are required by law to be open to the public, unlike tribal roads on which tribes can bar non-members' use. (Pet. 33a) The Federal Lands Highway Program specifically involves the states in various respects, even on roads built on Indian reservations. (Pet. 36a; 23 U.S.C. § 204(j); 25 CFR 170.7)

The BIA issued Solicitations for Bids on the four projects indicating a range of prices it expected to pay for each project. The top range for each project was sufficiently high to have permitted the addition of tax without any diminution in the road-building activity. (Record Proper (RP) 55, 63, 67, 71) Blaze's general manager testified that the BIA's engineer's estimate would include taxes if taxes were due. (Transcript of Proceedings (Tr) Side II, 018) The only testimony concerning whether the addition of tax would diminish the amount of roadbuilding activity was found by the finder of fact to be speculative, at best. (Pet. 37a)

Although bids had been submitted on all the contracts before April 10, 1986, when Blaze formally inquired whether its receipts would be subject to state tax, the Department promptly gave Blaze a written opinion that tax would be due. (RP 85) Blaze subsequently made numerous requests of the BIA for change orders, but never sought payment for these taxes. (RP 55-76) Nor did it report or pay the tax.

REASONS FOR DENYING THE WRIT

I. AUTHORITY OF STATES TO TAX FEDERAL CONTRACTORS BUILDING PUBLIC FEDERAL ROADS ON INDIAN RESERVATIONS IS

DETERMINED UNDER INTERGOVERNMENTAL TAX IMMUNITY PRINCIPLES, NOT THE SPECIAL INDIAN PRE-EMPTION DOCTRINE.

New Mexico's authority for taxing a federal contractor's receipts from performing construction services for an agency of the federal government, here the BIA, rests on thoroughly settled law and does not merit reconsideration here. This Court has repeatedly affirmed the authority of states to tax federal contractors. *United States v. California*, 113 S.Ct. 1784 (1993); *United States v. New Mexico*, 455 U.S. 720 (1982). Blaze concedes this point. Its petition for certiorari, therefore, asks this Court to establish an unprecedented extension of the Indian pre-emption doctrine, based on an untenable premise equating the BIA with tribal governments.

Blaze acknowledges that the Indian pre-emption analysis derives from notions of tribal sovereignty.[1] It seeks to supply

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[1] The Indian pre-emption doctrine has never been applied where a taxpayer has contracted with the federal government. In every case using that analysis, the taxpayer was dealing directly with a tribe or tribal member. *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd., Inc., v. Bureau of Revenue*, 458 U.S. 832 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). The Court's early formulation of the doctrine in *McClanahan* explains why it is limited to those dealing with tribes. What distinguishes Indian pre-emption from normal pre-emption is "Indian sovereignty . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172. The Court in *Bracker* confirmed tribal sovereignty as the key. "The unique origins of tribal sovereignty make it generally unhelpful to apply to federal enactments

that tribal sovereignty element by equating federal government activity on Indian reservations with tribal government activity. Blaze argues that "the BIA is acting as a surrogate on behalf of the tribe" (Pet. p. 16) and "the BIA is effectively providing local government services on behalf of the tribe." (Pet. p. 12)

Given the immense struggle tribes have fought against the United States government and the paternalism of its agencies, it is inappropriate for this business to presume to speak for tribes in arguing that the BIA is really equivalent to a tribal government. Any suggestion that the federal government is interchangeable with, or even has always supported, tribal governments completely ignores the roller-coaster history of federal policy towards tribal sovereignty.[2] The federal government can hardly be equated with tribal governments.

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regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law." 448 U.S. at 143.

[2] After the initial period of displacement and annihilation and after the surviving Indians had been corralled on reservations, Congress did not support tribal sovereignty at all. Rather, it advocated turning Indians into yeoman farmers through allotments under the General Allotment Act of 1887 in order to eliminate entirely reservations and tribal sovereignty. Beginning in the late 1920s and culminating with the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, Congress did a complete about-face, adopting policies to encourage tribal sovereignty. It reverted to a policy of urban resettlement and termination of tribal reservations and sovereignty during the 1940s and 1950s, and then resumed its encouragement of tribal sovereignty and economic development with the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451, *et seq.* and the Indian Self-Determination and Educational Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* *See* Felix Cohen, *Handbook of Federal Indian Law* (1982), Chapter 2 for a full discussion of this history.

The support and services the federal government provides Indians are not manifestations of tribal sovereignty, but more in the nature of reparation for their loss of land and way of life, *see* Cohen, *Federal Indian Law* 673.

Blaze confuses the exercise of *federal* governmental authority and obligation with the exercise of tribal sovereignty. The very nature of concentric sovereignties—state, federal and tribal—is that each sovereign performs some governmental functions on the same territory, within their overlapping jurisdictions. The fact that the federal government builds BIA roads on tribal lands, or interstate highways on state lands, does not endow the federal government with tribal or state sovereignty. Similarly, the fact that the state provides schools, roads, and senior citizen centers on reservations does not mean the state is exercising tribal sovereignty.

In lumping together the BIA and tribal governments, Blaze ignores the substantial body of law that distinguishes tribal governments from the federal government. *See United States v. Wheeler*, 435 U.S. 313 (1978) (federal government and tribal governments are independent sovereigns so that the double jeopardy clause does not bar separate prosecutions by each sovereign). The Supreme Court has repeatedly rejected a return to the federal instrumentalities doctrine equating tribes and the federal government. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 471 (1976). Tribes have been unwaveringly clear that the federal government most assuredly does *not* exercise *tribal* governmental authority or sovereignty. They have never been willing to make the federal government "a surrogate on behalf of the tribe" (Pet. p. 16) for the performance of tribal government functions.

Blaze argues that the Indian Self-Determination Act provides a comprehensive scheme to promote tribal self-governance, intertwining the BIA and tribes. Allowing states to tax BIA contractors, Blaze contends, would infringe tribal sovereignty because such taxation could influence whether a tribe chooses to assume responsibility for the performance of certain services otherwise performed by the federal government under its trust responsibilities.

This Court explicitly rejected any such interpretation of the Indian Self-Determination Act in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Acknowledging that the Indian Reorganization Act, the Indian Financing Act, and the Indian Self-Determination Act "'evidence to varying degrees a congressional concern with fostering tribal self-government and economic development,'" (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980)), the Court found no congressional intent to pre-empt state taxation in these acts. "[T]hey no more express a congressional intent to pre-empt state taxation of oil and gas lessees than does the 1938 Act." *Cotton Petroleum*, 490 U.S. at 183, (n. 14).

The fact that Congress in the Self-Determination Act authorized tribes to take over certain federal responsibilities on reservations only underlines the distinction between the federal government and the newly empowered tribal governments asserting their sovereignty. When tribes do assert their sovereignty and take over certain governmental responsibilities, by developing their forest industries in *Bracker*, their schools in *Ramah* or their hunting and fishing resources in *New Mexico v. Mescalero Apache Tribe*, that assertion of tribal sovereignty *does* invoke the Indian pre-

emption analysis. If carrying out government functions is left to the federal government, however, then Congress can and will decide whether a state tax on its contractors so interferes with its projects that such tax must be pre-empted.

Here, there can be no doubt that it is the federal government, acting through one of its agencies, on its own behalf that is contracting with Blaze. The law is well settled that New Mexico can tax federal contractors. No basis exists to justify extension of the Indian pre-emption analysis to determine the constitutionality of state tax imposed on federal contractors. Because there is no conflict in the law, this Court should not grant *certiorari*.

II. NO CONGRESSIONAL INTENT TO PRE-EMPT STATE TAX CAN BE FOUND WITHIN THE FEDERAL LANDS HIGHWAY PROGRAM.

Even were the Indian pre-emption doctrine applicable, that doctrine, as most recently interpreted by this Court in *Cotton Petroleum*, does not yield pre-emption of state tax here. Moreover, since the Indian pre-emption doctrine requires a case by case analysis, the result in this particular case will not affect other situations and does not merit the granting of *certiorari*.

A. State Responsibilities Toward Indian Citizens Provides A Strong State Interest in Imposing Tax on Transactions Between Non-Members.

Blaze's only contention under the Indian pre-emption analysis is that the New Mexico Supreme Court misinterpreted *Cotton Petroleum* to eliminate "the requirement in *Bracker* and

Ramah that the State identify a regulatory function or service related to the activity being taxed." (Pet. p. 24) Blaze argues that the state's general interest in raising revenue for the common good is insufficient.

Blaze fails to acknowledge that the time has long since passed when states provided no services to tribes which would justify their interest in taxing. States now spend millions of dollars on tribal reservations, more than justifying whatever slight and indirect impact may be felt by tribes from taxes imposed on non-members, the economic burden of which is borne by non-members.

Although focusing primarily on congressional intent, the Court in *Cotton Petroleum* did comment on the nature of the state and tribal interests involved. In particular, the Court recognized that New Mexico's annual expenditure of over $3,000,000 for the Jicarilla Apache tribe represented a substantial state interest. Interestingly, much of that expense funded education of Jicarilla tribal members. Inevitably, that same state support described in *Cotton Petroleum* here assisted Blaze with an educated workforce and tribal members with the ability to qualify for employment. Although it may once have been true that "federal legislation left the state with no duties or responsibilities respecting the reservation Indians," *Warren Trading Post*, 380 U.S. at 691, that simply is not true today. Tribal members living on reservations are full state citizens and entitled to all the benefits of such citizenship. New Mexico shoulders substantial burdens on tribal reservations, for schools, roads, corrections, welfare and low income comprehensive tax rebates. The Court recognized those interests as valid in *Cotton Petroleum* and explicitly found no

quid pro quo or "proportionality requirement" for state taxes and expenditures. 490 U.S. at 185.

Indeed, these state responsibilities provide a valid state interest in imposing tax on Indian reservation transactions between non-members in virtually every case. Whether that interest is outweighed by some special federal or tribal interest, expressed or implied in a federal program, lies at the heart of the Indian pre-emption analysis.

B. Any Impact on Tribal Interests is Indirect and Insubstantial, and Does Not Result From Taxes Imposed On or Passed On to Tribes.

The only tribal interest that Blaze suggests may be impaired by this state tax derives from speculation that increasing cost of construction to the federal government might reduce by some yards the extent of roads the federal government builds on tribal lands and the amount of work available to the tribal members on these projects. Such speculation ignores the contrary conclusion of the finder of fact that there was no showing of impairment of tribal interests. (Pet. 37a)

Moreover, *Cotton Petroleum* explicitly rejected such a resurgent federal instrumentalities doctrine under which pre-emption would be found in every situation where a state tax had any financial effect on the tribe.[3] The decision began with a discussion of the development of intergovernmental tax immunity, emphasizing that exactly such concern over economic burdens passed on to federal or tribal governments

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[3] *See Ramah*, 458 U.S. at 853-855 (Rehnquist, J. dissenting).

was rejected years ago with the repudiation of the federal instrumentalities doctrine. 490 U.S. at 173-175. After finding no congressional intent to pre-empt, the Court returned to a discussion of the effect of the tax on tribal interests. It acknowledged that the New Mexico severance tax could, indeed, affect the tribe indirectly, just as Blaze argues here.

> It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate.

Cotton Petroleum, 490 U.S. at 186-187. But that indirect burden was not enough.

> Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.

Id. Allowing such indirect burdens to pre-empt state tax would simply reinstate the repudiated federal instrumentalities doctrine.

> To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker* and *Ramah Navajo School Bd* would be to return to the pre-1937 doctrine of intergovernmental tax immunity. *Any adverse effect on the Tribe's financial interest caused by the taxation of a private party*

> *contracting with the Tribe would be grounds to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.*

Id. (emphasis added).

Blaze is relying on just such an indirect effect here. This Court's recent rejection of that argument counsels against the granting of *certiorari*.

C. Congress Clearly Intended These Indian Reservation Roads to be Treated the Same as Other Federal Lands Highways.

The final reason for denying *certiorari* is that the most significant factor in the Indian pre-emption analysis confirms the correctness of the decision below.

In *Cotton Petroleum*, the Court returned the primary focus of the Indian pre-emption analysis to a determination of congressional intent. First, the Court acknowledged that pre-emption is "primarily an exercise in examining congressional intent." 490 U.S. at 176. Then it proceeded to a thorough examination of the Indian Minerals Leasing Act and its legislative history, concluding that it was "fully consistent with an intent to permit state taxation of non-member lessees." *Id.* at 177-183. While the Court noted the language from *Bracker* and *Ramah* concerning the balancing of state, federal and tribal interests, the Court did not decide the pre-emption issue by cataloguing and balancing those interests, but by a determination of congressional intent.

An examination of the relevant federal statute here, which authorized Blaze's road-building projects, makes unmistakably clear that Congress specifically intended that these Indian reservation roads be treated the same as other Federal Lands Highway Program roads. 23 U.S.C. § 204(a) states

> (a) Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title.

This subsection emphasizing uniform treatment was added in Pub. L. 97-424, January 6, 1983; the former 23 U.S.C. § 208 specifically referring to Indian reservation roads was repealed in the same Act, further driving home the fact that no special treatment is afforded Indian reservation roads.[4]

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[4] Only a few differences in administration of these several types of roads are provided. Forest highways and public lands highways are administered by the Secretary of Transportation; park roads, parkways and Indian reservation roads are administered by either the Secretary of Transportation or the Secretary of the Interior. Indian employment may be used on Indian reservation roads and no ceiling on Federal employment is applicable; the "Buy Indian" Act and provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act apply to funds appropriated for Indian reservation roads to permit preferential hiring of Indians. Otherwise these programs are administered the same way.

There is no question that contractors building federal lands highways on forest land or park land must pay state gross receipts tax on their receipts from the projects. See, *United States v. New Mexico*. Nothing in the authorizing statute—23 U.S.C. § 204—intimates in any way that Indian reservation roads are to be treated any differently for state tax purposes. Legislative history supports the interpretation that all these Federal lands highways are to be treated alike. The Conference Committee Report to the 1983 amendments in Pub. L. 424 emphasized that in both the House and Senate bills the "Secretary of Transportation is made responsible for oversight and coordinating the Federal lands highways in order to ensure that such highways are treated under the same uniform policies." 1982 U.S. Code Congressional and Administrative News, 3709-3710.

The few regulations promulgated concerning Indian reservation road construction hardly evidence a "comprehensive federal scheme" indicative of a congressional intent to pre-empt state authority to tax. See 25 C.F.R. §170 *et seq*. Those regulations show that the Commissioner of Indian Affairs—not the tribes—plans, surveys, designs and constructs these roads, just as the other federal administering agencies do for federal lands highways built on other federal lands within those agencies' jurisdiction. The roads must be approved by the Secretary of Transportation. The tribes, like other local governments in whose jurisdiction federal lands highways are being built, establish priorities. Although the tribes may contribute to the cost of these roads, 25 C.F.R. § 170.6a, as may the states, 25 C.F.R. § 170.7, no such contribution is required, and none was made here. Any alleged pre-emptive effect of these few regulations is further weakened by the fact that the statute cited by several of the

regulations for authority—23 U.S.C. § 208—was repealed in 1983.

There is no implication anywhere in the statute or regulations governing the Federal Lands Highway Program of a congressional intent to maximize the benefit to those using these various roads by maximizing the miles of road built under the program. The Court in *Cotton Petroleum* discounted such maximization language, in any event, even where found in legislative history. 490 U.S. at 178-179.

This absence of any express or implied indication that Congress intended to pre-empt state authority to tax federal contractors building these Federal lands highways should end Blaze's pre-emption argument. The New Mexico Supreme Court's decision reflects a proper and unremarkable implementation of current law and should be left undisturbed.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

TOM UDALL
New Mexico Attorney General
FRANK D. KATZ
Counsel of Record
Sp. Asst. Attorney General
Taxation and Revenue Dept.
P.O. Box 630
Santa Fe, NM 87509-0630

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(505) 827-0731

Counsel for Respondent